95-1442(1)

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

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Barney K. Huang,
Petitioner,

v.

Becky R. French, Thomas J. Ziko, Bruce R. Poulton,
Board of Governors of the University of North Carolina,
North Carolina State University,
Respondents.

****

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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40 pp

QUESTION PRESENTED

What constitutes a sufficient forecast of the evidence for purposes of F.R.Civ.P., Rule 56, when a tenured professor of a public university alleges a violation of substantive due process because the university counsel, administrators and a state attorney orchestrated his termination with contrived documents and made arbitrary and capricious findings to buttress it which were not supported by the evidence?

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PETITION FOR WRIT OF CERTIORARI

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The Petitioner, Barney K. Huang, respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

Huang v. French, et al., 73 F.3d 357 (4th Cir. 1995) is reprinted in the appendix hereto.

GROUNDS FOR JURISDICTION

The decision of the Court of Appeals for the Fourth Circuit was issued on December 7, 1995.

No motion for rehearing was filed. There have been no motions submitted to this Court for extension of time within which to file this Petition for a Writ of Certiorari.

Jurisdiction to conduct the requested review is conferred upon this Honorable Court by 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This direct federal appeal involves the dismissal of Professor Barney K. Huang, a permanently tenured full Professor, who served productively for over twenty-seven years, from the faculty at North Carolina State University (NCSU).[1] An academician, scientist, researcher and teacher, Professor Huang joined the faculty at NCSU in January, 1963, as an Assistant Professor in the Biological and Agricultural Engineering Department (BAE), after completing his Ph.D. at Purdue University. In 1967, the plaintiff was awarded permanent tenure, made a full member of the graduate school faculty and promoted to Associate Professor. Six years later, in 1973, Dr. Huang was promoted to full Professor with permanent tenure.

At NCSU, his research duties included extensive work in the areas of design and perfection of highly sophisticated mechanical

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[1]The District Court dismissed the Petitioner's claim for violation of substantive due process with at footnote.

devices, environmental controls, and biophysical systems to aid in agricultural productivity wherein he is recognized internationally as an innovator, inventor, author and scholar. Professor Huang's teaching responsibilities included the sole responsibility for the instruction of BAE 661: Analysis of Function and Design of Biological and Physical Systems, a course for graduate students. In a career that has, to date, spanned more than twenty-seven years at NCSU, Professor Huang could be characterized as prolific. A naturalized U. S. citizen from Taiwan, the plaintiff was the only minority Professor in the BAE.

Upon becoming a full Professor, Dr. Huang began to vocalize his concerns regarding discriminatory treatment including disparities between his salary vis-a-vis other, non-minority BAE faculty members, including a number of whom were not full Professors nor with permanent tenure. Despite repeated questions, the plaintiff's pay, research and staff support irregularities were neither altered nor explained with a lawful explanation. By the early 1980's, the

plaintiff's persistent pursuit of proper compensation resulted in a concerted efforts by the department head and other non-minority faculty to dismiss him from the BAE faculty by regimenting continued adverse documents against Dr. Huang to establish incompetence, neglect of duty or misconduct, the only reasons for discharging a permanent tenured faculty member specified in the university code.

A series of incidents and actions on the part of the defendant Poulton, the former Chancellor of NCSU who was forced to resign in 1989 due to his own misconduct, and others in the BAE faculty followed, making the BAE an increasingly inhospitable environment for Professor Huang: research proposals and offers of grant funds by outside funding organizations were blocked by the defendant Poulton and others in his administration. The plaintiff's lab space was reassigned when Professor Dickens assaulted the plaintiff in 1989. Ultimately plaintiff's solar curing greenhouse research along with its federal and state funded facility were maliciously destroyed.

The defendant Poulton directed the set up of an "outside review," designed on the surface to appear "unbiased." This "review" was to be of Dr. Huang's scholastic work. However, it contained a secret, pre-arranged agreement with outside reviewers to obtain negative results to establish Professor Huang's incompetence. The university counsel also implemented covert surveillance of the plaintiff's movements by campus police and university staff to try to establish any misconduct. Both schemes failed in the face of Dr. Huang's outstanding academic performance and impeccable conduct.

In 1986 the defendant Poulton forcibly transferred Professor Huang from the BAE to the Division of University Studies (DUS), in the College of Humanities and Social Science, a department completely out of Dr. Huang's field of expertise, robbing Dr. Huang of his research facilities. This transfer was accomplished when the head of DUS agreed to take Dr. Huang for a temporary two year

period.[2] The transfer purportedly resolved BAE problems alleged against Dr. Huang, and according to defendant Poulton would provide Dr. Huang with an improved opportunity to serve NCSU and advance his career. His forced transfer was the key issue in *Huang v. Board of Governors of North Carolina,* 902 F.2d 1134 (4th Cir. 1990).

In this previous case, the Court of Appeals held that Dr. Huang had no constitutionally protected property interest in remaining with the BAE as an administrative unit of NCSU, despite its being Dr. Huang's area of expertise. *Id.* at 1141-1142. So, despite his resistance to the forced transfer and in spite of the fact that he had no research facilities, equipment or support, Dr. Huang dutifully began preparing DUS course and research proposals as requested. All proposals were denied as planned by the defendants. On March 17, 1988, in accordance with the Defendants' plan to terminate Plaintiff in two years, the defendant Poulton initiated termination proceedings

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[2]The documents procured in discovery show that this forced transfer was part of a scheme cooked up by the defendants to terminate Dr. Huang at the end of this two year period.

against Professor Huang for neglect of duty on the basis that he had failed to obtain a sufficiently large research grant. However, this tack was inherently flawed: it violated NCSU's own tenure rules established by the faculty senate. Nevertheless, a Faculty Hearing Committee was appointed to determine whether or not Dr. Huang should be terminated for neglect of duty. On July 14, 1988, Dr. Huang was informed of defendant Poulton's intent to dismiss Dr. Huang on the grounds of misconduct involving the incidents that took place in 1973, 1980, and 1985.

As luck or a curious combination of circumstances would have it, a window of opportunity opened through which defendants could rid themselves of Dr. Huang and his claims of racial discrimination. Through the window came Grace Wang, the wife of James Wang, a close associate and a former student of the plaintiff's old nemesis on the acting BAE head, Frank Humenik, falsely accused

Dr. Huang of attempted second degree rape.[3] The alleged assault did not involve NCSU, but the defendants French, Poulton, and Ziko took an active interest[4]. The defendants French, Poulton and Ziko attended Professor Huang's probable cause hearing in state court on July 14, 1988. The defendants tried to push Dr. Huang to accept a misdemeanor plea; however, Petitioner rejected the "offer." Immediately thereafter, the defendant Poulton suspended what few duties or opportunities remained for Dr. Huang.

The Defendants then switched course in their efforts to terminate Dr. Huang. The dismissal proceedings for neglect of duty were dropped without explanation. This time defendant Poulton notified Dr. Huang that he was now being terminated for misconduct; i.e., assaultive conduct toward individuals associated with the university. Furthermore, the defendant Ziko tried to use the alleged

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[3]Dr. Huang sued Dr. Humenik earlier in Federal Court in *Huang v. Board of Governors of North Carolina*, 902 F.2d 1134 (1990).

[4]The prosecutrix was neither a student nor faculty or staff member. The incident was not alleged to have occurred on campus.

charge as leverage to try to force the plaintiff to retire in exchange for the dismissal of the charge, as documented in a letter to Dr. Huang from his attorney.

Dr. Huang resisted and entered a plea of not guilty to the charges of Grace Wang. The jury acquitted him on the charge of attempted second degree rape, but found him guilty of the misdemeanor assault. The defendants arranged for four hostile BAE faculty members to sandbag Professor Huang at the trial. Ultimately the plaintiff prevailed on the misdemeanor when the North Carolina Court of Appeals exonerated him by reversing his conviction. *State v. Huang*, 99 N.C. App. 658, 394 S.E.2d 279, *disc. rev denied*, 327 N.C. 639, 399 S.E.2d 127 (1990). No retrial was ever heard, and the case ultimately was dismissed.

Events then began to move much more swiftly than ever and became increasingly Kafkaesque as the days passed. Dr. Huang was consigned to the jail on the misdemeanor. The defendant Poulton used this as the basis for suspending his pay and benefits in violation

of the University Code.

Dramatically, over Professor Huang's attorney's objections and while his client was absent, incarcerated on a conviction which would ultimately be vacated, the Faculty Hearing Committee convened to consider his dismissal. This procedure was in contravention of NCSU's own policies regarding dismissal of professors. Upon discharge on bond, Professor Huang prepared with the help of his attorney, his wife, and J. C. Williamson, Jr., Professor Emeritus, former Associate Dean and Director of the Agricultural Research Service at NCSU, a complex and exhaustive compilation of his achievements at NCSU, documentation of his salary irregularities, and his recordation of the concerted and persistent efforts to remove him. This 746 page compilation came to be known as the Huang notebook.

The Huang notebook was organized into seven logical, tabbed sections, and was indexed and integrated by use of Dr. Huang's thirty page summary, euphemistically called "witness testimony." Copies

of the notebook were distributed to the hearing committee members. The defendant Ziko, who prosecuted the matter, objected to the "witness testimony," summary and thereupon this vital index to the Huang notebook was not accepted into the record or made available to the FHC for use in studying the important evidence of the Huang notebook.[5]

Although Dr. Huang was a full Professor with permanent tenure, the FHC was composed of only three members of that status, including the Chairman, Chris Gould, who was handpicked at the direction of defendant Poulton. The other two members were Associate Professors, whose promotions and raises required defendant Poulton's approval.

The committee heard testimony, live and, incredibly, in the form of a transcript of some of Grace Wang's comments from the witness stand in state court. In spite of the fact that defendant Ziko

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[5]Professor Wood averred that in all of the Faculty Hearing Committees he had attended at NCSU, never was a professor prohibited from submitting everything he desired.

claimed that Grace Wang was not available, she was **never asked** to testify. The university code governing termination of tenured professors provided Dr. Huang the right to confront his accuser. The defendant Ziko singlehandedly rendered this provision meaningless.

The defendant French was present for the evidence hearing, but all committee members were not. The inquisition continued even after one committee member had to be excused for another commitment during the plaintiff's testimony. Finally, the proceedings concluded and the deliberations commenced. The first vote, deemed a "straw vote" was 3-2 in favor of Professor Huang. At a second, "official" vote taken the next day, the tally was 3-2 against Professor Huang.[6]

Professor Huang appealed to the NCSU Board of Trustees (BOT) which affirmed the decision. He then petitioned the University of North Carolina Board of Governors (BOG).

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[6]Associate Professor Mary Waleck, the "keeper of the record," changed her vote. She, along with Gould and Bedair, characterized the first poll as a "straw vote."

Simultaneously, Dr. Huang was pursuing a grievance against the defendants French and Ziko through the offices of the North Carolina State Bar. At the State Bar, the plaintiff discovered that the copy of the Huang notebook submitted to the BOT and pending before the BOG was **not** an exact copy of the one prepared by him (all original copies submitted to the faculty hearing committee were ordered **shredded** by defendant French except for member Mary Walek's (the Walek original), which was kept in the offices of the defendants' Poulton and French, although the defendant Poulton testified there were no shredding machines in their offices.[7]

The defendant Ziko admitted that copies of the Huang notebook submitted to the BOT and BOG were inaccurate. Defendants Ziko and French explained by reporting "copier misfeeds," although careful review of that version of the Huang record suggests a pattern of deletion and substitution designed to

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[7]Interestingly enough, the defendant French disagrees with Mary Walek as to how many copies of the Huang notebook Walek delivered. Associate Professor Walek could only remember one.

cause the material to appear adverse to Dr. Huang.

Indeed, a staggering 254 pages of key evidence in the Huang notebook were either deleted, altered or moved. The alteration of the Huang notebook completely changed its force, content and tenor. Another original Huang notebook was kept by committee member Dr. Arnold despite testimony by defendant French that **all** copies were delivered to the offices of defendants French and Poulton and later shredded. Dr. Arnold's notebook provided by the defendants in discovery is not the complete notebook provided to him by Dr. Huang during the FHC hearing. Dr. Arnold testified that he did not alter it at all. Over two hundred pages were deleted before Dr. Arnold testified. This discovery further illustrates the sinister prospect of deliberate alteration.

Dr. Huang vigorously pursued all of his administrative remedies to no avail. This case followed.

At the same time Dr. Huang pursued his appeals through the administrative process to the Wake County North Carolina Superior

Court. In reviewing the termination of Professor Huang, the Wake County Superior Court, and on appeal by the BOG, the North Carolina Court of Appeals, found violations of Petitioner's substantive due process rights.[8] Defendant Poulton notified Dr. Huang that he intended to dismiss him from his tenured position as a full Professor because he had engaged in verbal and physical assaults on several individuals associated with the University, to wit: Dr. Dallas Chen in 1973, Dr. Henry Y. R. Chen in 1980, Dr. Francis Hassler in April 1980, Professor James W. Dickens in 1985 and Mrs. Grace Wang in June of 1988. The North Carolina Court of Appeals, like the Wake County Superior Court, found that at the time the alleged incident occurred between Grace Wang and Dr. Huang, June 1988, she was not associated with the North Carolina State University in any capacity. In consequence, the Court held this incident should

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[8]The North Carolina Supreme Court reversed the Court of Appeals decision on other grounds. *Huang v. Board of Governors*, 336 N.C. 67, 441 S.E.2d 696 (1994) (deciding *per curium* that the dissenting opinion in the Court of Appeals was correct in holding that the scope of review under the "whole record test" for a university administrative appeal precluded the state trial court from premising a holding on such findings, even though such facts could be found).

not have been a consideration in the dismissal of Dr. Huang.

Additionally, the North Carolina Court of Appeals, like the Wake County Superior Court, found that NCSU did not proceed against Dr. Huang in regard to the 1973 Dallas Chen incident and 1980 Hassler and Henry Chen incidents until 1988. Further, it found that in January 1985, defendant Poulton instigated an investigation of the "Huang matter" after an altercation between Dr. Dickens and Dr. Huang. This investigation apprised defendant Poulton of the Dallas Chen, Henry Chen and Dr. Hassler incidents, and even after the secret report was compiled by the university counsel to condemn Dr. Huang, defendant Poulton did not initiate any discharge proceeding based upon alleged assaultive conduct until three and one-half years later.

The Court found that defendant Poulton attempted to have Dr. Huang transferred after the Huang matter was investigated, but Dr. Huang resisted and filed a grievance with the Faculty Mediation Committee (FMC). The FMC found that Dr. Huang's transfer was in the best interest of both Dr. Huang and BAE. Dr. Huang was praised

as an innovative researcher and a proven effective teacher with great potential to contribute to NCSU. Indeed, the FMC's report mentioned nothing about Dr. Huang's alleged assaultive misconduct. Dr. Huang was subsequently transferred to the DUS department by force as set in the secret plan unknown to the FMC members or Dr. Huang.

REASONS FOR GRANTING WRIT

Overview

The Order of the District Court, affirmed by the Opinion of the Fourth Circuit, makes all tenured professors in the University of North Carolina system, employees at will, in the sense that their terminations can be arbitrarily and capriciously manufactured by those who wish to end their careers. Petitioner seeks only a jury to determine the truth surrounding the circumstances of his firing. The evidence shows that the individual defendants worked together to place Dr. Huang in a position of employment vulnerability by transferring him and to terminate him by dredging up old, and already academically adjudicated events. The transfer and termination have

to be understood as coextensive parts of the same strategy to terminate a tenured professor at will. This kind of arbitrary transfer followed by dismiss constitutes a dire threat to academic freedom and higher public education.

Standard of Review

The petitioner has a property interest to which the protections of due process attach: scholarly tenure. *Brenna v. Southern Colorado State College,* 589 F.2d 475, 477 (1978). Such an interest must be present to trigger the constitutional protections of substantive due process. *See generally, Board of Regents of State College v. Roth,* 408 U.S. 564 (1972). Failure to follow an established tenure policy can support a claim of substantive due process. *Bignall v. North Idaho College*, 538 F.2d 243 (9th Cir. 1976). "Substantive due process is triggered only if those rights are dealt with in an arbitrary or capricious manner." *Brenna*, 589 F.2d at 477.

> "The [g]overnment's obligation to accord due process sets at least nominal substantive limits on its prerogative to dismiss

> its employees: it forbids all dismissals which are arbitrary and capricious." *Major v. Hampton*, 413 F. Supp. 66, 69 (E.D. La. 1976) (quoting *Norton v. Macy*, 417 F.2d 1161, 1164 (D.C. Cir. 1969)).

"[C]onstitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952). Courts have defined arbitrary and capricious as "willful and unreasonable action without consideration or in disregard of facts or without determining principle."[9]

In *Drown v. Portsmouth School District*, 451 F.2d 1106 (1st

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[9]BLACKS LAW DICTIONARY 96 (5th ed. 1979). For additional definitions of arbitrary and capricious see *United States v. Carmack*, 329 U.S. 230, 243 n.14 (1946). Arbitrary is defined as "without adequate determining principle . . . [or] fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned . . . ." *Id.* Capricious is defined as "apt to change suddenly, freakish; whimsical; humorsome". *Id. See also Bruno's, Inc. v. United States*, 624 F.2d 592, 594 (5th Cir. 1980)(arbitrary and capricious means either "unwarranted in law" or "without justification in fact."); *Dynalectron Corp. v. United States*, 659 F. Supp. 64, 68 (D.D.C. 1987) (one indicia of arbitrary and capricious conduct is "subjective bad faith.").

Cir. 1971), the First Circuit followed the Fourth Circuit's rationale in *Johnson v. Branch*, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967) and found a substantive due process violation where the reasons for the discharge were "simply too insignificant to justify the ultimate sanction of non-renewal." *Drown*, 451 F.2d at 1108; *see generally, Kelly v. Johnson*, 425 U.S. 238, 244, 247-48 (1976); *Harrah Independent School Dist. v. Martin*, 440 U.S. 194, 197 (1970); *cf. Morris v. Board of Educ. of the Laurel School Dist.*, 401 F. Supp. 188, 201 (D.Del. 1975). The court in *Drown* explained that a reason may be arbitrary and capricious in any of three ways:

1) If the reason is unrelated to the particular process involved or to the working relationships within the institution;

2) If the reason is *trivial*; or

3) If "it is wholly unsupported by a basis in uncontested fact either in the statement of reasons itself or in the [employee's] file."

Drown, 451 F.2d at 1108. *Drown* allows employees to challenge the factual significance of the reasons for the discharge. Thus, the substantive basis of the discharge is directly in issue and its outcome is generally determinative.

Professor Huang has alleged, and supported his allegations with evidence, that these individual defendants acted arbitrarily and capriciously, with improper motive and based their actions upon trivial reasons.

The Arbitrary and Capricious Standard

In *Johnson v. Branch*, 364 F.2d 177, 181 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967), the Fourth Circuit was one of the first circuit courts to hold that reasons underlying an employee discharge may be arbitrary, capricious, or trivial and may, therefore, violate the employee's right to substantive due process.[10] In *Johnson*, the Fourth

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[10]The underpinnings of *Johnson* are traced to *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952), where this Court explained that "constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary or discriminatory."

In *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988), the Court reaffirmed this theory by holding that the government cannot arbitrarily interfere

Circuit concluded that the termination of a public school teacher must be based upon fact and supported by reasoned analysis." *Johnson*, 364 F.2d at 181. Thus a terminated public employee may attack the substantive validity of the asserted grounds for the adverse employment action. This is exactly what Dr. Huang has done, by submitting genuine issues of material fact that the individual defendants worked collectively together to orchestrate his termination, not based upon his employment record, but rather on their elaborate thought out plan to get rid of Dr. Huang within two years.

The Improper Motive Standard

In *Barnett v. Housing Authority of the City of Atlanta*, 707 F.2d 1571, 1577-78 (11th Cir. 1983), the Eleventh Circuit held that a discharge for pretextual, improper reasons constitutes a substantive

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with even a private sector employment relationship. *Weiman* and *Mallen* have thus laid the fundamental groundwork for the lower courts applying substantive due process in public employment cases. The time has come for elaboration as to what kind of evidence will suffice to get to the jury.

due process violation. *Accord Hearn v. City of Gainesville*, 688 F.2d 1328, 1332-33 (11th Cir. 1982); *see also, Roane v. Callisburg Indep. School Dist.*, 511 F.2d 633, 639 (5th Cir. 1975); *Crocker v. United States*, 127 F. Supp. 568 (Ct. Cl. 1955); *Morrison v. Board of Educ.*, 1 Cal.3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969). Barnett, an employee of the city housing authority, introduced substantial evidence indicating that the alleged basis for his discharge, insubordination and his superiors' lack of confidence, were pretextual. Barnett's evidence suggested that Board members were angered over public pressure over the selection of a particular developer and attempted to make Barnett a scapegoat for the increasing public pressure. The crux of Barnett's substantive due process claim was that the actual motive for his discharge differed from the asserted reasons and that the actual reasons were improper. Unlike Dr. Huang, Barnett got his day in court: the jury found in his favor.

Perhaps the leading case grounded upon the improper motive standard of substantive due process protection is *Hearn v. City of*

Gainesville, 688 F.2d 1328 (11th Cir. 1982); *cf. Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988)(personal or group animus as improper motive for substantive due process recognized). In *Hearn*, the Eleventh Circuit upheld a $52,500 verdict for a discharge in violation of substantive due process. *Id.* at 1336-37. There, the employee was purportedly discharged due to a layoff. *Id.* at 1331. However, the employee contended, and the jury found, that the alleged layoff was a "phony arrangement" and that the employee was discharged because of "animosity" by the personnel department head. *Id.* at 1332. The discharge controverted substantive due process because it was "for an improper motive and by means that were pretextual, arbitrary and capricious . . ." *Id.* (citations omitted).

Thus, these cases illustrate that a claim can be maintained wherein the asserted reasons are not the real reasons for termination. These methods of constitutionally improper decision making are precisely what Professor Huang alleged, and on which he offered a

forecast of evidence. The defendants' evidence, at a minimum, only created an issue of fact for the jury.

The Triviality Test

An example of the triviality test at work is *Fisher v. Snyder*, 476 F.2d 375 (8th Cir. 1973), *affirming*, 346 F. Supp. 396 (D. Neb. 1972), where the employee was dismissed for "conduct unbecoming a teacher." The alleged unbecoming conduct consisted of overnight visits in the plaintiff's home by her son's friends. The defendant's finding of "unbecoming conduct" was premised on the fact that the plaintiff was a single woman and that the overnight visits were therefore improper. However, the Eighth Circuit rejected that rationale and found a violation of substantive due process reasoning that the decision to discharge the plaintiff was improper as the decision was not supported by a legitimate basis in fact. *Id.* at 377-78.

Fisher stands for the proposition that a trivial reason cannot constitutionally support a termination of a public employee. Use of the years-old incidents which had already been adjudicated in Dr.

Huang's transfer out of the BAE Department once again to terminate him were trivial.

Summary

The time has come for this Court to give guidance to the lower courts as to what constitutes a threshold showing of evidence for purposes of summary judgment in the context of an allegation of violation of substantive due process in the public employment arena. Dr. Huang has made such a threshold showing and requests this Court issue the Writ of Certiorari to clarify this important question of federal law.

CONCLUSION

For the foregoing reasons this Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

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UNPUBLISHED
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BARNEY K. HUANG, *Plaintiff-Appellant,*	)	
v.	)	
BECKY R. FRENCH; THOMAS J. ZIKO BRUCE R. POULTON; BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA; NORTH CAROLINA STATE UNIVERSITY, *Defendants-Appellees,*	)	No. 93-1314
and	)	
TROY A. DOBY; JOHN N. GREGG, *Defendants.*	)	

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
W. Earl Britt, District Judge.
(CA-91-393-5-CIV-BR)

Argued: July 12, 1993

Decided: December 7, 1995

Before ERVIN, Chief Judge, and BUTZNER and PHILLIPS, Senior Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: John Kirk Osborn, Chapel Hill, North Carolina; J. Matthew Martin, MARTIN, MARTIN & MARTIN, P.A., Hillsborough, North Carolina, for Appellant. Tiare Bowe Smiley, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees. **ON BRIEF:** Michael F. Easley, Attorney General of North Carolina, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See **I.O.P.** 36.5 and 36.6.

OPINION

PER CURIAM:

Barney K. Huang, formerly a tenured professor at North Carolina State University (NCSU) brought this employment discrimination action in which he challenged his dismissal from the University faculty on numerous statutory and constitutional grounds. The district court granted summary judgment in favor of the defendants on each of Huang's theories of recovery. Huang appealed and we affirm the grant of summary judgment.

I.

A.

This is the latest in a series of civil and criminal actions involving Huang as a result of an inter-departmental transfer, criminal charges and finally his dismissal from the faculty of NCSU. The first lawsuit is reported in *Huang v. Board of Governors of University of N.C.*, 902 F.2d 1134 (4th Cir. 1990), where this court held *inter alia*, that Huang's inter-departmental transfer did not involve an infringement of a constitutionally protected property interest.

In June of 1988, Huang was charged with attempted second degree rape and assault on a female by Grace Li Wang. When he was ultimately brought to trial, a jury acquitted him of the second-degree rape charge by found him guilty of assault on a female. Huang appealed his conviction to the North Carolina Court of Appeals, which overturned his conviction and granted him a new trial based on an improper allowance of expert testimony by the Superior Court. *See State v. Huang*, 394 S.E.2d 279, 283-4 (N.C. App.), *disc rev. denied*, 399 S.E.2d 127 (N.C. 1990). At oral argument, we were informed by Huang's counsel that these criminal charges were ultimately dismissed.

At about the time Huang filed the present suit, he also filed a companion case in state court, challenging his dismissal under the North Carolina Administrative Procedure Act, 150B N.C. Gen. Stat. §§ 150B-1 to B-57 (1991 and Supp. 1992), and asserting claims of breach of contract and intentional infliction of emotional distress. The trial court granted Huang's motion for summary judgment on the breach of contract claim and awarded summary judgment in favor of the defendants on the emotional distress claim. On appeal, however, the North Carolina Court of Appeals vacated the trial court's

remedies. *See Huang v. North Carolina State University,* 421 S.E.2d 812, 815 (N.C. App. 1992). After he exhausted his administrative remedies, the State trial court again heard the matter on Huang's appeal from the final administrative decisions of the Board of Governors of the University of North Carolina and North Carolina State University. The trial court reversed those final administrative decisions discharging Huang and ordered that Huang be reinstated to his former position with full back pay and benefits. The respondents then appealed to the North Carolina Court of Appeals, and a panel of that court, by a vote of 2 to 1, affirmed the decision of the trial court in favor of Huang. *Dismissal Proceedings Against Huang,* 431 S.E.2d 541 (N.C. App. 1993). A subsequent appeal to the North Carolina Supreme Court resulted in an order reversing the decision of the Court of Appeals and remanding the matter for the entry of an order upholding the University's action. *Matter of Dismissal Proceeding's Against Huang,* 441 S.E.2d 696 (N.C. 1994) (per curiam).

B.

Barney K. Huang, a naturalized citizen from Taiwan, instituted this action on June 21, 1991 challenging his dismissal as a tenured professor from the faculty of North Carolina State University. In his complaint, Huang asserted: (1) an equal protection claim under 42 USC § 1983 and Article I, Section 19 of the North Carolina Constitution; (2) a discrimination and retaliation claim under Title VII of the Civil Rights Act of 1964, 42 USC § 2000e-2(a) and 3(a); (3) a due process claim under both the Fourteenth Amendment to the Federal Constitution and Article I, Sections 1 and 19 of the North Carolina Constitution; (4) a free speech claim under the First Amendment to the Federal Constitution; and (5) an age discrimination claim under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq ("ADEA"). The district court held: (1)

that Huang had agreed to the entry of summary judgment as to defendants Doby and Gregg; (2) that Huang's Title VII discrimination claims were time-barred by the 180 day statute of limitations for bringing a claim for administrative relief to the attention of the EEOC; (3) that Huang's discrimination claim under 42 USC § 1983 should be dismissed because Huang had failed to prove discriminatory motive on the defendants' part; (4) that Huang's retaliatory discharge claim should be dismissed because Huang had failed to show a causal connection between his exercise of protected rights (i.e., the filing of an EEOC claim) and his discharge; (5) that Huang had failed to show how any of his rights to substantive and procedural due process under the Fourteenth Amendment, as defined respectively by the Federal Constitution and state law, had been violated by the conduct of the hearings that resulted in the recommendation of his discharge; and (6) that as a result of its rulings on Huang's federal law claims, it no longer had jurisdiction to entertain Huang's supplemental state-law claims, and dismissed them without prejudice.

The district court then granted the defendants' motion for summary judgment in all respects. Huang appealed to this court. He did not dispute that summary judgment was warranted as to his First Amendment and ADEA claims. He also conceded that summary judgment in favor of defendants Doby and Gregg was proper. Huang assigned error to only one of the district court's rulings. He contended that the district court erred in concluding that the conduct of the Faculty Hearing Committee which led to his ultimate discharge from the NCSU faculty did not deny him procedural and substantive due process rights as guaranteed by the Fourteenth Amendment.

At oral argument on July 12, 1993 we were advised of the July 6, 1993 decision of the North Carolina Court of Appeals and that the defendants would appeal from that ruling to the North Carolina

Supreme Court. As a consequence we on July 21 entered an order placing this case in abeyance pending a decision by the Supreme Court of North Carolina. That decision was rendered on April 8, 1994. 441 S.E.2d 696. We then permitted the parties to file supplemental briefs addressing the preclusive effect of that Supreme Court decision.[1]

II.

We have given due consideration to the briefs, supplemental briefs and arguments of the parties, and we affirm the judgment of the district court for the reasons set forth in its opinion. *Huang v. French, et al.*, No. 91-393-CIV-5-BR. EDNC, January 11, 1993.

AFFIRMED.[2]

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[1]It is likely that the decision by the North Carolina Supreme Court has no preclusive effect on the federal claims, *see Davenport v. North Carolina Dept. of Transp.*, 3 F.3d 89 (4th Cir. 1993); it may have some preclusive effect on an issue of fact, i.e., the issue of assault on Ms. Wang. We elect not to decide this appeal on that ground.

[2]The appellant's motion to file a corrected appendix is granted.